IN THE

Supreme Court of the United States

May Term, 1976

No. 75-1679

PENA NENOFF, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF NENO S. NENOFF, DECEASED,

Petitioner,

vs.

GEORGE M. THOMPSON,

Respondent.

On Appeal From The Final Order Of The Supreme Court Of The State Of Ohio, Dismissing An Appeal Of The Judgment Of The Court Of Appeals For Lucas County, State Of Ohio.

[PURSUANT TO 28 U.S.C. SECTION 1257 (2)]

JURISDICTIONAL STATEMENT OF RESPONDENT

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CITATIONS

INTRODUCTION

Respondent submits this brief to clarify the factual statement of petitioner. This petition is taken from a Judgment and Opinion of the Sixth Appellate District of Ohio and not the Ohio Supreme Court. The latter court denied petitioner's appeal as a matter of right holding that no substantial constitutional question exists and overruled petitioner's motion to certify. It is respectfully submitted that this case does not qualify for review under a Writ of Certiorari by the Supreme Court of the United States.

A. *JURISDICTION*

Petitioner is attempting to invoke jurisdiction of the United States Supreme Court for the purpose of claiming that Section 4515.02, *Ohio Revised Code,* held unconstitutional by the Supreme Court of Ohio in the case of *Primes vs. Tyler,* 43 O.S. 2d, 195; 331 N.E. 2d 723 (1975), is in conflict with provisions of the federal and state constitutions. This Petition is based upon a question that is moot.

B. *STATEMENT OF THE CASE*

This case concerns a traffic accident that occurred September 19, 1967. It was tried to a jury in the Common Pleas Court of Lucas County, Ohio, which returned a verdict for the defendant-respondent on May 26, 1970. Judgment was entered upon the verdict and the state court trial judge, Nicholas J. Walinski, was appointed Judge of the United States District Court for the Northern District of Ohio. A motion for new trial was denied by Common Pleas Judge Robert L. Gilson. It took several years for a transcript of the trial to be furnished Judge Gilson, whose decision was filed October 9, 1974 (Petitioner's Appendix A34-62). An appeal was then taken to the Court of Appeals for the Sixth District, and the alleged assignments of error denied on all counts (A.17-24). A motion to reconsider was also filed and denied. (A.25-33) Notice of Appeal was thereupon filed in the Supreme Court of Ohio and the appeal and Motion to Certify denied. (A.1-4).

Petitioner filed this suit claiming wrongful death and survival damages. The Petition alleged that the decedent was a passenger in a motor vehicle being operated by respondent, but at trial no admissible evidence was presented to alter the fact that the decedent was a guest of respondent at the time of the accident.

Petitioner elected to try this law suit under a theory of willful or wanton misconduct. At the close of the evidence, petitioner submitted eight special instructions for the court to give the jury, which dealt expressly on the liability issues of the case. Petitioner's special instruction 2-A and B discussed the requirements for a finding of wanton misconduct and special instruction 8 directed the jury on the issue of exemplary damages if the jury found the respondent guilty of wanton misconduct. Petitioner's special instruction number 7 concerned the affirmative defense of Assumption of Risk, and discussed the circumstances of that defense.

Thereafter, following arguments by both sides, the court instructed the jury generally on the issues of willful or wanton misconduct and assumption of risk, to which no objection was made by petitioner nor any suggestion by petitioner or request that the court charge on the issue of negligence instead of willful or wanton misconduct.

The traffic accident, the subject of this suit, occurred on the Front Street exit ramp going left off the Craig Memorial Bridge in Toledo, Ohio. The Front Street exit presents two courses to a motorist going south over the bridge, a gradual 9 degree ramp to the right for traffic intending to go west on Front Street, and a severe 22 plus degree curve to the left for traffic going east on Front Street.

Respondent had been accustomed to taking the right gradual Front Street ramp as he drove it 5 or 6 times a day to his place of business in East Toledo. He was not familiar with the left ramp. however, only having taken it 4 to 8 times in the past 5 years.

In the middle of the Craig Memorial Bridge is a 50 M.P.H. sign

and the Front Street exit is just past the south end of the bridge. There are no signs in the exit providing a speed limit or otherwise warning motorists of the sharp curve ahead. The ramp goes downhill, over a bridge, and then into the curve.

On the afternoon of September 19, 1967, respondent had been at his bar restocking and performing other such chores for the evening trade. He had had lunch that day at the bar operated by the petitioner. Up to the middle of the afternoon he had had no alcoholic beverages, but from then to 6:00 P.M. he had 4 drinks consisting of one shot of gin in a tall glass with soda. Witnesses testified respondent was not under the influence of alcohol when they were with him just before the accident occurred. Respondent sustained a head injury in the accident for which he was treated at the hospital.

Shortly after 5:00 P.M., Neno Nenoff, the decedent, came into respondent's bar and had a drink. Then, about 6:00 P.M., Mr. Nenoff and respondent left the bar and respondent drove his own car intending to drive Mr. Nenoff and himself to Packo's, a restaurant on Front Street east of the Craig Memorial Bridge, intending to eat dinner. They drove into downtown Toledo, past a restaurant called "Jim Feak's", (Mr. Nenoff wanted to see it) then out Summit Street and across the bridge.

Respondent drove across the bridge with the flow of traffic, a 50 M.P.H. posted speed zone. He was not familiar with the curve to the east and assumed it was similar to the one going west until he was into it, lost control of his car and hit a light pole. Upon impact, Mr. Nenoff, who was sitting in the right front seat, was thrown out of the car and his head struck the pole. He remained unconscious for a period of approximately two hours, and then died of his injuries.

Different witnesses from direct observation to expert calculation, placed respondent's speed into the curve at approximately 50 to 60 M.P.H. Respondent testified his speed was 45 to 50 M.P.H. at the curve. Mary Ann Frederick, an eye witness, estimated respondent's speed at 60 M.P.H., give or take, at the ramp. It

should be noted here that her estimate came after 5 or 6 trips to the ramp with John Rust, petitioner's counsel, and his discussions with her of speed.

At the commencement of trial, respondent made a motion for the separation of witnesses, and it was granted. John Rust, petitioner's counsel, requested Pauline Nenoff, decedent's wife, to leave the courtroom pursuant to the court's ruling. No objection was made to her leaving and no proffer was made of any reason why her absence until her testimony was presented would prejudice the petitioner's case.

Later, after her testimony, Pauline Nenoff was instructed to leave the courtroom by Kelsey Bartlett, another of petitioner's counsel, as she was intended to testify again as a rebuttal witness. The exchange between the court and Mr. Bartlett was as follows:

The Court: That is all, Mrs. Nenoff, thank you. You may step down.
Do you want the witness to remain in the courtroom or not?

Mr. Bartlett: The witness should remain out of the courtroom. We may need her for rebuttal purposes.

Never, at any point in the trial, did petitioner make any objection or specifically request that Pauline Nenoff or the children sit at counsel table with Pena Nenoff, the decedent's mother and the fiduciary of his estate as well as the petitioner's plaintiff in the case.

1. *WHERE A PARTY IN TRIAL REQUESTS AND THE COURT GIVES TO THE JURY SPECIAL INSTRUCTIONS OF LAW, AND THE JURY RETURNS A VERDICT AGAINST THAT PARTY, HE CANNOT ASSIGN AS ERROR UPON APPEAL THE TRIAL COURT'S INSTRUCTIONS HE REQUESTED.*

This case was tried in May of 1970, and at that time Section

2321.03, *Ohio Revised Code,* was in effect and provided that error can be predicated upon erroneous statements contained in the charge, *not induced by the complaining party,* without exception being taken to the charge (emphasis ours). Since July of 1971, the new Ohio Rules of Civil Procedure provide that no party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Rule 51 (A), Ohio Rules of Civil Procedure. Ohio case law has been consistent and the Supreme Court definitive, and careful to hold that an error of commission in the charge by the court to the jury may be the subject of appellate review without an objection, so long as the charge complained of was not induced by the complaining party. *Carrothers vs. Hunter,* 23 O.S. 2d, 99; 52 O.O. 2d, 392. A very clear analysis of the situation here was made by The Ohio Supreme Court in the case of *Hasapes vs. Drake,* 24 O.S. 2d 1; 53 O.O. 2d, 1, in which that court declared:

> "* * *, a special instruction, requested by appellant and given by the court, contains the principle of law which appellant now asserts to be erroneous. Although we are sensitive to the fact that trial tactics often change during the course of the trial, a trial court cannot be placed in a position of having to choose between a party's inconsistent positions. If the reason for this change in plaintiff's position was shown in the record, and the request for the instruction withdrawn, perhaps a reviewing court would know which path the litigant elected to follow. Plaintiff's mere exceptance to his own requested instruction does not remove the badge of inducement which served to precipitate the error. Section 2321.03, Revised Code, provides, in part, that 'error can be predicated upon erroneous statements contained in the charge, not induced, by the complaining party * *'. See Carrothers vs. Hunter (1970), 23 Ohio St. (2d) 99, 52 O.O. (2d) 392; Rhoades vs. Cleveland (1952), 157 Ohio St. 107, 47 O.O. 91; State vs. Tudor (1950), 154 Ohio St. 249, 43 O.O. 130. Under the circumstances, appellant's request for the instruction amounts to an inducement by appellant to the court to make the charge complained of, foreclosing appellate review of the assigned error." 53 O.S. 2d, at p. 3.

Although the distinction has been made in alleged errors of commission, as opposed to errors of omission, it has generally been held that a complaining party must object to an error of omission in a charge of the trial court to the jury before it can be considered as a claimed error on appeal. *Rhoades vs. Cleveland,* 157 O.S. 107; 47 O.O. 91. If the claimed error of the trial court here was omitting to charge the jury on the question of negligence, then petitioner had the obligation to object or bring to the attention of the trial court the charge omitted. Nowhere in the record of the case at bar did the petitioner request of the trial court a charge to the jury on negligence, nor was any submitted by the petitioner as a special instruction or other such request.

If the petitioner is now claiming error of commission to the effect that the trial court committed error in instructing the jury on the issue of willful or wanton misconduct, the trial court was induced to charge by the petitioner's own conduct. As stated, petitioner chose to try this case with an effort to obtain exemplary damages for alleged willful or wanton misconduct, and submitted to the trial court special instructions on the subject of liability which the trial court approved and gave to the jury. Petitioner, after the jury has returned a verdict against her, is claiming error in the court's charge on liability, which was given to the jury at petitioner's request. This cannot be done.

To hold otherwise would be to establish precedent for the practice of a party electing to submit an instruction to the court to give to the jury and then, having had an adverse jury verdict against it, claim error in the precise instruction requested. Petitioner here had no concern regarding a charge on the issue of negligence as the record clearly shows.

The Ohio authorities clearly support respondent's proposition on this point 3 0. Jur. 2d, *App. Review*, Section 185, discusses the matter as follows:

"A reviewing court in appeals on questions of law will only

consider such errors in a lower court as were preserved by objection, ruling, or otherwise, in that court. The law imposes upon every litigant the duty of vigilance in the trial of a case and where the trial court commits an error to his prejudice, he is required then and there to call the attention of the court to that error. A just regard to the fair administration of justice requires that an opportunity should be given the court to avoid the commission of error upon trial, and that when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences."

"The law does not permit the party to lie by, without stating the grounds of his objection, to take the chances of success on the grounds in which the judge has placed the cause, and then, if he fails, avail himself of an objection in which, if it had been stated, might have been removed."

* * * * *

"The well-settled general rule that one cannot urge for the first time on appeal objections which could have been obviated if they had been made below, is based largely upon a kind of estoppel, since the party who fails to raise an objection in the lower court, which might have been there corrected should not be allowed to wait until the cause comes before the reviewing court."

A few of the many cases that support this proposition are as follows: *Younger vs. Halliday,* 107 O.S. 432 (1923), where the court held that it was too late after trial to complain initially that the original petition was not sufficient to admit the evidence introduced on trial without an objection to that at the trial. This case and very similar language was cited in *Coffee vs. Shank,* 68 O.O. 2d, 356 (1974); in *Indian Hill vs. Atkins,* 57 O.L.A. 210 (1949) the court said that since the appellant had cited no point in a trial record where the issue had been raised there was therefore no error in the trial court for ignoring that issue; in *Univis vs. Kaplan,* 55 O.L.A. 243 (1949) the court held that where there was no claim of inconvenience or lack of time at the trial, the party claiming this error could not raise that issue on appeal. Petitioner's request for the special

instructions and the court's granting and reading them to the jury induced the court to make an alleged error upon which the petitioner now chooses to base this appeal. The petitioner is foreclosed from making this assigned error. *Hasapes vs. Drake, Supra.* A party cannot lie by, take the chances of success on one ground, and then upon failure object. *State vs. Childs,* 14 O.S. 2d 56; *State vs. Glaros,* 170 O.S. 471.

It has been recently asserted in *State vs. Morris,* 42 O.S. 2d 307, that it is a general rule that an appellate court will not consider any error which could have been called to the trial court's attention at a time when such error could have been avoided or corrected. That was not done here.

It should also be noted that petitioner never questioned the constitutionality of the "guest statute" and, as such, it is waived. *Cuthbertson vs. State,* 106 O.S. 658; *Village of Clarington vs. Althar,* 122 O.S. 608; *State vs. Webber,* 163 O.S. 598; *Columbus vs. Ewing,* 77 O.L.A. 31; *City of Toledo vs. Gfell,* 107 O.A. 93.

Similarly, no objection was made by petitioner to the fact that the general charge instructed the jury on the issues of willful and wanton misconduct, as also charged upon petitioner's request in Special Instructions, and there was no request for the court to charge on the issue of negligence.

Petitioner's claimed Proposition of Law I is improper since it provides that a party need make no timely objection as to the constitutionality of a statute. This is simply not true. The case of *Primes vs. Tyler,* 43 O.S. 2d 195, is not controlling here because of the election of the petitioner to try this case on the issue of willful and wanton misconduct and submit Special Instructions on those subjects which were given to the jury.

2. ***ERROR IN THE CHARGE OF THE TRIAL COURT DEALING EXCLUSIVELY WITH ONE OF TWO OR MORE COMPLETE AND INDEPENDENT ISSUES REQUIRED***

TO BE PRESENTED TO A JURY IN A CIVIL ACTION WILL BE DISREGARDED, IF THE CHARGE IN RESPECT TO ANOTHER INDEPENDENT ISSUE WHICH WILL SUPPORT THE VERDICT OF THE JURY IS FREE FROM PREJUDICIAL ERROR, UNLESS IT IS DISCLOSED BY INTERROGATORIES, OR OTHERWISE, THAT THE VERDICT IS IN FACT BASED UPON THE ISSUE TO WHICH THE ERRONEOUS INSTRUCTION RELATED.

If the petitioner were assumed correct, for sake of argument, in citing error in the trial court's instruction on willful and wanton misconduct, the "two-issue rule" applied to this case affirms the jury's verdict. The two-issue rule as stated above is that error in the charge of the court dealing exclusively with one of two or more complete and independent issues required to be presented to a jury in a civil action will be disregarded, if the charge in respect to another independent issue which will support the verdict of the jury is free from prejudicial error, unless it is disclosed by interrogatories, or otherwise, that the verdict is in fact based upon the issue to which the erroneous instruction related. *Bush, Admr. vs. Harvey Transfer Co.,* 146 O.S. 657; *Martinez vs. Corcino,* 4 O. App. 2d 408, 33 O.O. 2d 499.

In the case at bar, this rule applies to the defense of assumption of risk. The jury returned a general verdict for the defendant-respondent. There were no interrogatories submitted or special verdict requested. Petitioner agreed that the defense of assumption of risk of decedent was a proper issue for jury determination, never having objected to the court's instruction on it and even submitting a special instruction of her own on it which was accepted by the court and read to the jury.

The case of *Weaver vs. Hicks,* 11 O.S. 2d 230, 40 O.O. 2d 203, presents a lengthy discussion concerning the availability of assumption of risk as opposed to contributory negligence, in defense of a claim of willful or wanton misconduct. The court distinguished between contributory negligence and assumption of risk and held

that willful and wanton misconduct may obviate a defense of contributory negligence, but assumption of risk was still a defense against willful or wanton misconduct.

The court held in syllabus 1 as follows:

> "1. The defense of assumption of the risk is available to a defendant where a plaintiff consents to or acquiesces in an appreciated, known or obvious risk to the safety of the plaintiff, even where willful and wanton misconduct on the part of the defendant may be proved."

See also *Clos vs. Bauer*, 34 O.O. 2d 213, and *Gill vs. Arthur*, 24 O.O. 138.

In the case at bar, decedent and respondent had been drinking together before they left the bar, intending to go to a restaurant for dinner. They had driven together to downtown Toledo, respondent showing decedent where Jim Feak's Restaurant was located, then out Summit Street and across the Craig Memorial Bridge. There is no evidence, circumstantial or otherwise, to even hint that decedent complained of respondent's driving and asked to get out of the car.

If the jury looked at respondent's conduct as related to the accident and concluded that he was guilty of willful or wanton misconduct, the same facts would also support their further conclusion that decedent, by his own conduct, assumed the risk of the injuries he sustained at such time and place. This would require the jury to return a verdict for the defendant-respondent, as the jury did.

That petitioner also claims error now in the court's charge of willful and wanton misconduct is irrelevant since it was not done at trial; and, further, petitioner submitted to the court a Special Instruction on assumption of risk of the injuries he sustained in the accident, thus acknowledged at trial by all to be an issue for jury determination. That issue alone justifies the jury's verdict regardless of any question of the propriety of the trial court instructing on willful and wanton misconduct.

3. *IN A WRONGFUL DEATH ACTION, IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO PERMIT A WIDOW AND HER CHILDREN BENEFICIARIES TO SIT WITHIN THE BAR OR AT COUNSEL TABLE WHEN THEY ARE REPRESENTED BY ANOTHER WHO IS NOMINAL PARTY PLAINTIFF AND FIDUCIARY OF THE DECEDENT'S ESTATE.*

It is well settled upon the authorities cited before that claimed errors which arise during the course of a trial which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal.

Neither Pauline Nenoff nor the children were competent to testify concerning the auto accident or circumstances leading to it, as they were in Flint, Michigan at the time, the accident occurring in Toledo. Their testimony had only to do with the damages aspect of the case. There is no hint that petitioner's counsel was hindered, let alone prejudiced, by the absence at the trial table of them. In fact, after their testimony, they sat in the courtroom with counsel, with no objection of respondent.

Even though it is respectfully submitted that Petitioner's Proposition of Law is improper, the issue was not properly raised in the trial court and therefore should not be permitted to be raised on appeal.

Regardless, it has always been the law in Ohio that it is within the discretion of the trial court to permit a widow and her children beneficiaries represented by a nominal plaintiff to sit within the bar or counsel table and within view of the jury during the trial. *Cincinnati, etc. vs. Stanislaus,* 13 O.C.C. N.S. 260, affd. 83 O.S. 477. 52 O. Jur. 2d, *Trials,* Section 45. In the case of *Long, Admr. vs. Maxwell Co.,* 24 O.O. 2d 446, a survival-wrongful death case, the decedent was the father of three children, leaving them and a wife surviving. The wife was the fiduciary of his estate. The trial court excluded the children from the courtroom except for a brief

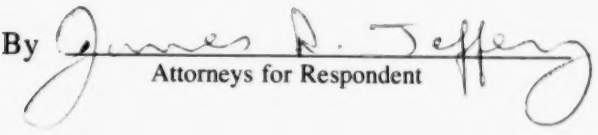
appearance before the jury, and this was cited as error. The Court of Appeals affirmed the trial court holding that the children, along with their mother the executrix, were in the anomalous position of being most interested in a judgment, yet the children were not actual parties to the action. The children had a right to appear at trial and be viewed by the court and jury. But the discretion of the trial court excluding them otherwise must be upheld. *Long* was not a case where beneficiaries were excluded from any appearance or participation at trial, and neither is the case at bar.

Petitioner, for reasons outside the control of the trial court or respondent, is the mother of the decedent, not his wife. The mother was chosen as plaintiff for trial and the representative of the widow and children of deceased. The mother sat throughout and participated in the trial from beginning to end. The wife and children all testified before the jury and sat in the courtroom after their testimony, the wife sitting at counsel table. There is no complaint, nor record of any sort, that petitioner's counsel needed Pauline Nenoff for consultation during other testimony and, indeed, she could have no first hand knowledge of the auto accident involved. It is respectfully submitted, no matter how hard petitioner attempts to confuse the concept of a ''party'', that petitioner made no record at trial upon which this claimed error can be based, and the procedure followed at trial was proper and a correct exercise of the discretion of the trial court.

CONCLUSION

It is respectfully submitted that this case has had a full appeal and is not a proper subject for review by the United States Supreme Court. Petitioner's claim that this Court take jurisdiction should be overruled.

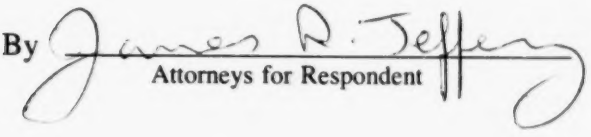
SPENGLER, NATHANSON, HEYMAN,
McCARTHY & DURFEE

By 
Attorneys for Respondent

CERTIFICATION

This is to certify that on the 16th day of June, 1976, a copy of the foregoing Brief was sent by United States mail to John G. Rust, Esq., attorney for petitioner, at 833 Security Building, Toledo, Ohio 43604.

SPENGLER, NATHANSON, HEYMAN,
McCARTHY & DURFEE

By 
Attorneys for Respondent